



## **STATEMENT OF THE CASE**

John A. Murphy, pro se, appeals the post-conviction court's denial of his petition for post-conviction relief, filed after he pleaded guilty to Stalking, as a Class B felony, pursuant to a plea agreement. Murphy presents the following issues for review:

1. Whether the post-conviction court abused its discretion when it denied Murphy's motion for change of venue from the judge.
2. Whether the post-conviction court abused its discretion when it denied his motion for permission to file a belated appeal.
3. Whether the post-conviction court abused its discretion when it denied his motion for default judgment.
4. Whether the post-conviction court erred when it denied Murphy's request to subpoena certain witnesses.
5. Whether the post-conviction court abused its discretion when it granted the State's motion for an extension of time to file proposed findings of fact and conclusions of law.
6. Whether Murphy's trial counsel was ineffective for failing to challenge the use of a supplemental probable cause affidavit.
7. Whether the trial court erred when it imposed an enhanced sentence.

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On October 12, 2004, under cause number 49G17-0410-CM-185158 ("04-185158"), the State charged Murphy with Invasion of Privacy, as a Class A misdemeanor. On November 5, 2004, the State filed an amended information, charging Murphy with Stalking, as a Class B felony; Stalking, as a Class C felony; Residential Entry, as a Class D felony; Intimidation, as a Class A misdemeanor; Invasion of Privacy, as a Class A misdemeanor; and Invasion of Privacy, as a Class D felony. On May 4,

2005, Murphy pleaded guilty to one count of stalking, as a Class C felony, and the State dismissed the remaining charges. The plea agreement provided for an eight-year sentence, with five years executed and three years suspended to probation. Also under the agreement, Murphy's probation in cause numbers 49G17-0409-CM-170608 ("04-170608") and 49G17-0409-CM-160629 ("04-160629") was revoked and Murphy agreed that the suspended sentences under those causes would be served consecutive to each other and to the sentence in the present case. The trial court sentenced Murphy accordingly on May 4, 2005.

On September 13, 2005, Murphy filed a pro se petition for post-conviction relief, raising the following claims: (1) that his trial counsel was ineffective; (2) that the trial court accepted a guilty plea without a factual basis; (3) that he did not knowingly and intelligently enter into the plea agreement; (4) that he was coerced into entering the plea agreement; and (5) that the sentence imposed exceeded statutory limitations. On October 11, 2005, the State filed its answer to the petition.<sup>1</sup> After a hearing, the trial court entered its order, including findings and conclusions, and denied post-conviction relief. In response to Murphy's motion to correct error, the post-conviction court issued an amended order, which also denied post-conviction relief.<sup>2</sup> Murphy now appeals.

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<sup>1</sup> The State's answer lists cause numbers "04-160629," "04-170608," and "04-185158." Appellant's App. at 165. The trial court's order also references all three cause numbers, and the State asserts that on November 16, 2006, the trial court limited the post-conviction issues to be addressed to be those in Cause Number "04-185158."

<sup>2</sup> The order was amended to reference the applicable sentencing statute, namely the presumptive sentencing statute as opposed to the advisory sentencing statute.

## **DISCUSSION AND DECISION**

### **Standard of Review**

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. A post-conviction court's findings and judgment will be reversed only upon a showing of clear error, that which leaves us with a definite and firm conviction that a mistake has been made. Id. (citations omitted). In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. Id.

### **Issue One: Change of Venue**

Murphy contends that the post-conviction court abused its discretion when it denied his motion for change of venue from the post-conviction judge. We cannot agree. “[A] petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner’s affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, . . . .” P-C.R. 1(4).

Here, Murphy’s motion was not verified, nor does it reference an affidavit stating the facts and reasons that he believed the trial judge to be biased or prejudiced. More importantly, in his motion Murphy asserted no historical facts or specific reasons to

support that belief but, instead, merely recited as allegations the requirements in the post-conviction rule. See State ex rel. Whitehead v. Madison County Circuit Court, 626 N.E.2d 802, 802-03 (Ind. 1993) (“the rule requires the judge to examine the affidavit, treat the historical facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice.”). The mere recitation of the elements in the post-conviction rule as allegations is inadequate to support a motion for change of venue from the judge. Thus, the post-conviction court did not abuse its discretion when it denied Murphy’s motion.

### **Issue Two: Belated Appeal**

Murphy next argues that the post-conviction court abused its discretion when it denied his motion to file a belated appeal. But Murphy has provided neither cogent reasoning nor citation to law to support that contention as required by the appellate rules. See Ind. Appellate Rule 46(A)(8) (“The argument section [of a brief] must contain the contentions of the appellant on the issue presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on, in accordance with Rule 22.”). Thus, the issue is waived.

Waiver notwithstanding, Murphy’s claim on this issue is without merit. “[W]hile Post-Conviction Rule 1(2) permits an individual convicted after trial by jury or guilty plea who fails to file a timely notice of appeal to petition for permission to file a belated notice of appeal, receiving that permission requires the petitioner to make two showings by a preponderance of the evidence: (1) that the failure to file a timely notice of appeal is

not the fault of the petitioner; and (2) that the petitioner has been diligent in requesting permission to file a belated notice of appeal.” Witt v. State, 867 N.E.2d 1279, 1281 (Ind. 2007) (citing P-C.R. 1(2)).

Here, Murphy was sentenced on May 4, 2005, and he filed his motion for permission to file a belated appeal on September 26, 2005. In that motion, Murphy asserted that he was sentenced on May 4, 2005; that upon sentencing he was sent to the Indiana Reception Diagnostic Center (“RDC”); that he was unable to file or mail a notice of appeal while in the RDC; that he was a layman; and that no appeal had yet been perfected. Those allegations do not demonstrate that Murphy was not at fault for failing to file a timely appeal or that he was diligent in seeking permission to file a belated notice of appeal. Thus, Murphy’s claim that the post-conviction court abused its discretion when it denied him permission to file a belated appeal is without merit.

### **Issue Three: Default Judgment**

Murphy also maintains that the post-conviction court abused its discretion when it denied his motion for default judgment. Specifically, he argues that default judgment was proper because the State’s answer “neither makes reference or reply to, nor proposes any reason that the relief prayed for in the petition for post conviction relief filed in Cause No. 49G17-0409-CM-185158 should not be granted.” Appellant’s Brief at 9. Again, Murphy has provided neither cogent reasoning nor citation to law to support that contention as required by the appellate rules.<sup>3</sup> See App. R. 46(A)(8). As a result, the issue is waived.

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<sup>3</sup> Murphy cites to Indiana Trial Rule 56 as setting out the procedure for motions for default judgment, including the requirement of a responsive pleading. However, Rule 56 governs motions for

Waiver notwithstanding, the State's answer specifies that it is the response to Murphy's petition for post-conviction relief filed in Cause Number 04-185158, albeit by interlineation. The answer also addresses the issues raised in the petition filed under that cause number. Thus, the post-conviction court did not abuse its discretion when it denied the motion for default judgment.

#### **Issue Four: Subpoenas**

Murphy contends that the post-conviction court erred when it refused to issue subpoenas to order the attendance of certain witnesses<sup>4</sup> at the hearing on his petition for post-conviction relief. However, in his brief, Murphy provides no factual support for his claim but merely recites that he requested and was denied subpoenas for certain witnesses. And, again, he has provided neither cogent reasoning nor citation to law to support that contention as required by the appellate rules.<sup>5</sup> See App. R. 46(A)(8). The issue is waived.

Waiver notwithstanding, Murphy's claim must fail. The post-conviction rules provide for the issuance of subpoenas as follows:

If a pro se petitioner [for post-conviction relief] requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the

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summary judgment. Indiana Trial Rule 55 governs motions for default judgment, and it does not require a responsive pleading.

<sup>4</sup> In his brief, Murphy does not specify by name or otherwise indicate from which subpoena request rulings he is appealing. The appendix contains Murphy's requests to subpoena testimony from Tamara McMillin, Terry T. Cooper, Scott Allen, Anne Brant, and Tami Murphy. The post-conviction court denied all of those requests, and we assume Murphy is appealing the denial of each.

<sup>5</sup> Murphy cites to Indiana Trial Rule 45 as setting out the procedure for the issuance of subpoenas. However, Indiana Post-Conviction Rule 1(9)(b) applies when a subpoena is requested in post-conviction proceedings.

witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

P-C.R. 1(9)(b). The court has discretion to determine whether to grant or deny the petitioner's request for a subpoena. Allen v. State, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003). An abuse of discretion has occurred if the court's decision is against the logic and effect of the facts and circumstances before the court. Id.

Here, Murphy's requests for subpoenas stated the topics he expected each witness to testify about, but the requests did not provide details of the facts expected to be contained in that testimony. Also, some of the subpoenas requested testimony from individuals about a no-contact order, an issue not raised in the petition for post-conviction relief. In sum, Murphy failed to specify the facts to be testified to by each witness, and he requested subpoenas for testimony on irrelevant subjects. Thus, the trial court did not abuse its discretion when it denied his requests for those subpoenas.

#### **Issue Five: Motion for Extension of Time**

Murphy claims that the post-conviction court abused its discretion when it granted the State an extension of time to file proposed findings of fact and conclusions of law. But yet again, Murphy has provided neither cogent reasoning nor citation to law to support that contention as required by the appellate rules.<sup>6</sup> See App. R. 46(A)(8). Thus, the issue is waived.

Waiver notwithstanding, we address Murphy's claim. Rulings upon non-statutory motions for continuance are within the discretion of the trial court and will be reversed

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<sup>6</sup> Murphy cites to Indiana Trial Rule 45 as setting out the procedure for the issuance of subpoenas. However, Indiana Post-Conviction Rule 1, § 9(b) is the applicable rule in the present case.



only for an abuse of that discretion and resultant prejudice. Evans v. State, 809 N.E.2d 338, 342 (Ind. Ct. App. 2004), trans. denied. An abuse of discretion occurs only where the evidence is clearly against the logic and effect of the facts and circumstances. Id. Here, the State requested an extension of time to file its proposed findings of fact and conclusions of law, stating that the extension was necessary because of the caseload and inexperience of the deputy prosecutor preparing that filing. We cannot say that the trial court's grant of an extension of time to file the proposed findings and conclusions is clearly against the logic and effect of the facts and circumstances in this case.

#### **Issue Six: Ineffective Assistance of Counsel**

Murphy contends that certain evidence necessary to support his stalking conviction should not have been admitted at trial. Specifically, he argues that the supplemental affidavit of probable cause was altered and “had [his] trial counsel challenged this affidavit, it would have not been allowed at trial[.]” Appellant’s Brief at 11. He further argues that trial counsel’s failure to challenge the affidavit “led directly to [Murphy’s] agreement to enter into the plea agreement rather than take the matter to a trial on the merits[.]” Appellant’s Brief at 12. In essence, then, Murphy raises an ineffective assistance of counsel claim. However, Murphy did not raise in his post-conviction petition an issue regarding an alleged defect in the supplemental probable cause affidavit, either separately or as part of his ineffective assistance of counsel claim. As such, he has waived this claim for review. See Badelle v. State, 754 N.E.2d 510, 521 (Ind. Ct. App. 2001), trans. denied.

### **Issue Seven: Sentence**

Finally, Murphy raises a claim under Blakely v. Washington, 542 U.S. 296 (2004), arguing that the trial court erred by sentencing him to an enhanced sentence without jury fact-finding of aggravating factors. But Murphy agreed to a specific sentence in the plea agreement. That agreement provides in relevant part:

[A]t the time of sentencing, the State will make the following recommendation as to the sentence to be imposed: Count III Stalking/FC 8 years. 5 years executed (156 + 156 credit). 3 Years Suspended, 3 Years Probation. Probation terms open to argument. Revoke Probation under cause number 04-170608 with suspended time of 349 days to run consecutive to the executed sentence in cause number 04-185158. Revoke probation under 04-160629 with a suspended time of 297 days to run consecutive to the executed sentence under cause number 04185158 and the executed sentence under cause number 04-170608.

Appellant's App. at 120. A sentence that is greater than the presumptive sentence and is imposed pursuant to a plea agreement is not an enhanced sentence. Smith v. State, 829 N.E.2d 1021, 1026 (Ind. Ct. App. 2005), trans. denied. Thus, such a sentence is not subject to a claim under Blakely. See id. Because Murphy agreed to the sentence to be imposed, he cannot now claim that his sentence exceeded the presumptive sentence based on aggravators that were not found by a jury.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.